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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE POWERS, Defendant and Appellant.	C045100 (Super. Ct. No. SF087124A)

A jury convicted defendant Robert Lee Powers of carjacking (Pen. Code, § 215, subd. (a)--count 1), attempting to evade a peace officer (Veh. Code, § 2800.2--count 2), and unlawfully driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a)--count 3). In separate proceedings, the trial court found that defendant had two prior serious felony convictions within the meaning of Penal Code section 667, subdivision (a)(1) (the five-year enhancement), and Penal Code sections 667, subdivision (d), and 1170.12, subdivision (b) (the Three Strikes Law). The court dismissed the remaining special allegations on the

prosecution's motion. It sentenced defendant to 62 years to life in prison: 27 years to life in count 1 (the upper term tripled); 25 years to life in count 2 to be served consecutively; 25 years to life in count 3 to be served concurrently; and five years for each of the two Penal Code section 667, subdivision (a)(1), enhancements, to be served consecutively.

Defendant contends he is entitled to reversal because of various evidentiary and instructional errors. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 11:45 p.m. on December 20, 2002, Edna and Rolando Cabrera stopped to put gas in their Toyota 4Runner at the Chevron station on frontage Highway 99 and Eight Mile Road near Stockton. Edna noticed two men standing near the gas pump. She went to the shop to pay, but it was already closed. Edna returned to the vehicle and told Rolando to use his credit card to pay for the gas at the pump. She got into the 4Runner on the passenger side and her husband got out of the driver's side to pump the gas.

While Edna waited, she noticed a man she later identified as defendant, walking slowly toward her car. He stopped, then suddenly jumped into the driver's seat and locked the door. As defendant started to drive away, Edna grabbed his jacket and said, "No, no, no," in an effort to get him to stop the car. Defendant reached for his pocket with his right hand, told Edna,

"Get the fuck out of here," and stepped on the gas. Edna jumped from the moving vehicle and hit her head on the pavement.

The couple called 911. About three hours later, San Joaquin County Sheriff's Deputy Roger Gillingwater saw the 4Runner traveling westbound on Morada Lane. When a backup unit arrived, Gillingwater activated his red lights and siren to initiate a traffic stop. The 4Runner took off. It evaded the officers for approximately five miles over residential and commercial streets at speeds up to 50 miles per hour, running stop signs and red lights, and traveling on the wrong side of the road. The 4Runner slowed suddenly at the intersection of Bianchi and West Lane. Defendant jumped out of the driver's side door and ran in front of the vehicle just before it crashed into a building. Deputy Gillingwater found codefendant Steven Lucas in the back seat of the 4Runner and arrested him.

Defendant fled over a fence. He was apprehended by Stockton Police Officer Anthony Desimone, who had joined the chase. Walking back to the patrol vehicles with defendant in handcuffs, Desimone commented to his partner that it was funny that defendant stopped in the middle of the intersection. Defendant interjected, "I think I lost the tranny."

At approximately 3:00 a.m., the officers called Edna and Rolando Cabreras to the intersection of Bianchi Road and West Lane. Edna positively identified the 4Runner. She also identified defendant as the person who jumped inside the 4Runner

and codefendant Lucas as the person who was with him at the gas station.

Defendant testified at trial. He stated he was at Marjorie Michael's residence the night of December 20, 2002. According to Michael, defendant was smoking crank while she was doing the laundry. Defendant testified that Lucas arrived in a Toyota 4Runner sometime after midnight. He did not think the vehicle was stolen because the steering column appeared to be in good condition. Lucas asked defendant to go with him to Lodi to pick up some guns. Defendant said he agreed on condition Lucas give him one of the guns. He wanted the gun to trade for drugs. The two men left Michael's residence after 1:30 a.m. According to defendant, they drove around Lodi, but were unable to find the place to get the guns. On the way back, defendant noticed a police car following them. At that point Lucas admitted to defendant that he had stolen the 4Runner. Defendant said he told Lucas to "[h]it the gas" because there was a parole hold on him. He also stated that as they neared the end of the pursuit, Lucas panicked and jumped into the back seat. Defendant slid across to the driver's seat, grabbed the wheel, yanked it one way, then jumped out and fled.

DISCUSSION

I

The prosecution moved in limine to impeach defendant with his prior felony convictions in the event he chose to testify at trial. The priors included a 1996 San Joaquin County conviction

of attempted robbery (Pen. Code, §§ 211 & 664) and a 1991 Washington State conviction of "rape of a child" (Revised Code of Washington section 9A.44.076). Defense counsel objected, characterizing the Washington State offense as statutory rape. The trial court overruled the objection, but agreed with defense counsel that the Washington State prior should be sanitized. In direct and cross-examination, defendant testified he had been convicted of a felony involving a sexual crime.

Defendant argues the court abused its discretion in allowing the prosecution to impeach him with the Washington State conviction. He reiterates his claim that the crime was equivalent to statutory rape, an offense that does not involve moral turpitude. Defendant contends he was prejudiced by the evidentiary ruling because the "erroneously admitted impeachment portrayed [him] as a sexual deviate." We conclude the error, if any, was harmless.

As we explained, defendant acknowledged he had been convicted of a sanitized version of the prior, that is, "a felony sexual offense." At the same time, defendant admitted a separate prior felony conviction for attempted theft with the use of a gun. That prior was more relevant to the charged offense of carjacking than the sexual offense--and potentially more damaging to the defense case. Moreover, the evidence against defendant was overwhelming. Edna Cabrera identified defendant at the scene and at trial as the man who carjacked the 4Runner. Defendant's unsolicited comment to the deputies, "I

think I lost the tranny," supported a finding that defendant was the driver. Measured against this and other prosecution evidence, the defense case was simply not credible. Accordingly, we conclude that, assuming for the sake of argument that the Washington State prior should not have been used, it is not reasonably probable that defendant would have obtained a more favorable outcome if the Washington State prior had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Defendant argues the trial court abused its discretion in allowing the prosecution to elicit other crimes evidence--specifically, that he habitually robbed dope dealers--in cross-examination. Citing *People v. Gambos* (1970) 5 Cal.App.3d 187 (*Gambos*), defendant contends testimony that he obtained his narcotics by robbing drug dealers was "not squarely contradictory" to his earlier testimony that he did not pay for the drugs and was therefore inadmissible on the trial court's theory that he "opened the door" to that line of questioning.

We will affirm if the trial court's ruling was correct on any ground. (*In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 143, p. 391.) As we explain, the evidence was relevant to more than one issue in the case and admissible to show motive under Evidence Code section 1101, subdivision (b).

A. *Defendant's Testimony:*

The extent of defendant's methamphetamine addiction was revealed during direct and cross-examination. Defendant admitted on direct that he "got loaded" on the night of the carjacking incident. He also stated, "I'm a dope fiend, I slam dope." Defense counsel clarified defendant's testimony:

"[DEFENSE COUNSEL]: So, . . . you're not trying to--to boast about your drug usage in testifying are you?

"[DEFENDANT]: Naw, I'm not trying to boast about it. I'm, I mean, I [*sic*] been a dope user since I was about twelve-years-old."

Defendant admitted during cross-examination by the prosecution, without defense objection, that he met codefendant Lucas "over a bowl of crank" and did not know him well. He also admitted, without objection, that Lucas was going to give him a gun that he intended to give to his dealer for more dope. Defendant claimed that he had been awake for 20 days straight and used eight grams of methamphetamine, or one-quarter of an ounce, the night of the incident. At that point, the following exchange took place:

"[THE PROSECUTOR]: How much did a half ounce cost you on the street?

"[DEFENDANT]: I didn't have to pay for it.

"Q. I'm sorry?

"A. I don't got to pay for it."

Defense counsel asked to approach the bench. The prosecutor explained his purpose in questioning defendant on his drug use: "I am not asking anything about his other crimes. What I am asking him about is that he opened the door, he--in his direct, Your Honor, he brought out the fact that how much dope he does and--and all that. Now I get to ask how--how --to prove that he's not telling the truth. I get to cross-examine the questions." Before hearing defendant's testimony outside the presence of the jury, the court suggested the defense had opened the door when defendant testified, "I don't pay for it." The prosecutor then elicited the following testimony from defendant: (1) he obtained methamphetamine by cooking and manufacturing it; (2) he received the drugs he used on the day of the incident for free through "homeboy love"; (3) he purchased his narcotics at a discount for approximately $400 a week; (4) he worked only at odd jobs; and (5) he either made his own methamphetamine, received it as a gift, did odd jobs to pay for it, or bartered goods for it.

Based on defendant's testimony outside the presence of the jury, the prosecutor argued, "It is very much my right to prove motive, and I need to show that he can't afford his drug habit, which is why he is going around committing the crimes." He stressed that defendant's testimony was "not coming in to show that he cooks drugs. It's coming in to show that his story is unfathomable." The court denied the prosecutor's request to continue questioning defendant on how he obtained his drugs, but

promised to think about the issue overnight. During further cross-examination by the prosecution, defendant admitted that he was running from his parole officer, was subject to a parole hold because of a "dirty . . . urinalysis," and had not signed up for a drug program.

The court reconsidered its ruling the following morning, stating: "[F]rankly, I think I got distracted by the verbiage of uncharged acts and immediately started the [Evidence Code section] 1101(b) analysis. [¶] But I think it really is much simpler than that. He was asked a question, 'How much does a half ounce of methamphetamine cost?' [¶] And he answered, 'I don't pay for it.' [¶] I think by doing that, he opened it up. [¶] And the issue for the--it's not necessarily an issue of credibility under 1101(b). It is an issue of motive to commit the crime. And that is to finance his drug habit. [¶] So I think from that standpoint, it comes in." The court continued with an Evidence Code section 352 analysis, concluding that the probative value of the evidence outweighed the potential prejudice in light of testimony already before the jury.

During the continued cross-examination by the prosecutor, defendant stated that the one-half ounce of methamphetamine he used the day of the incident had a street value of between $300 and $350. He then reiterated that he did not pay $350 for it. When asked how he acquired his narcotics, defendant replied, "I get them given to me. Trade. Barter. I could cook it. And I take it." He explained how he would "take" the narcotics:

"A. It's what's called a burn, burn your dope dealer.

"Q. You ever rob your dope dealer?"

"[¶] . . . [¶]

"A. Not my personal dope dealer.

"Q. Have you ever robbed any dope dealer?

"A. Yeah.

"[¶] . . . [¶]

"Q. When you rob your--when you rob dope dealers, do you take anything other than narcotics?

"A. Just dope. [¶] . . . [¶] I'm in it-- I'm in it for one thing and that's the dope."

B. "*Opening the Door*:"

Defendant relies on *Gambos* for the proposition that the "opening the door" theory of admissibility is a "popular fallacy." (*Gambos*, *supra*, 5 Cal.App.3d 187, 192.) We conclude the facts of *Gambos* are readily distinguishable from those of the present case.

In *Gambos*, *supra*, 5 Cal.App.3d 187, defense counsel "out of the hearing of the jury, announced an intention to establish on cross-examination of a police officer that Joyce [defendant's housemate] had stated that the heroin found in the kitchen drawer belonged to her. His theory was that as a 'declaration against penal interest,' the statement, although hearsay, was admissible. No contention was then or thereafter made that Joyce was unavailable as a witness. The district attorney responded, 'I am not going to object if you ask the question,

but you opened the door; that allows me to elicit the entire conversation.' The remainder of the 'conversation' sought to be elicited was Joyce's later declaration that she knew nothing about the heroin found under the mattress. Defense counsel then established before the jury that Joyce had claimed ownership of the heroin found in the kitchen. On redirect examination by the district attorney, and over objection of defendant, the witness then testified that Joyce 'said she didn't know anything about' the material found under the mattress." (*Id.* at p. 191.) On appeal, the court held that by declining to object to the admission of inadmissible hearsay, the prosecution "gains no right to the admission of related or additional otherwise inadmissible testimony." (*Id.* at p. 192.) In dictum the court explained, "The so-called 'open the door' or 'open the gates' argument [was] a 'popular fallacy.'" (*Ibid.*)

Here, defendant testified and his testimony "opened the door," in the colloquial sense, to the prosecution's questions on cross-examination. Defendant's testimony on the extent of his drug habit was relevant and admissible to explain why he was apparently unconscious of the strictures of society the night of the carjacking. More importantly, defendant's responses to the prosecutor's questions were admissible to establish a motive for the carjacking under Evidence Code section 1101, subdivision (b).

California law prohibits the introduction of evidence of uncharged acts to prove a defendant's disposition or propensity

to commit the crime charged. (Evid. Code, § 1101, subd. (a); *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) However, "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) We review admission of evidence under Evidence Code section 1101, subdivision (b), for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

The admissibility of other crimes evidence to prove motive depends on three principal factors: "'(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence.'" (*People v. Robbins* (1988) 45 Cal.3d 867, 879 (*Robbins*).)

A defendant's need for money is relevant to show his motive to commit a theft offense. (*People v. Reid* (1982) 133 Cal.App.3d 354, 362.) Similarly, evidence that a defendant has a drug habit that requires expenditures beyond his apparent means is relevant to his motive to commit a theft-related offense under Evidence Code section 1101. (*Ibid.*) However, for this evidence to be admissible to show motive, the prosecution must first establish "the extent of appellant's drug habit, what drugs he used, how often he used them, and how expensive his individual habit was." (*Id.* at pp. 362-363.) Without that

link, it cannot be said that evidence of a defendant's drug habit has a tendency to prove a motive for robbery. (*Id.* at p. 363.)

The record reveals that the testimony the prosecution elicited in cross-examination was material to defendant's motive for the carjacking. It tended to show defendant lacked funds to support his $350-a-week methamphetamine habit and therefore turned to other means, including carjacking, to get the cash he needed. (See *Robbins*, *supra*, 45 Cal.3d 867, 879.) Defendant does not challenge the admission of his testimony under Evidence Code section 352. We conclude the trial court did not abuse its discretion under Evidence Code section 1101, subdivision (b), in admitting testimony that defendant robbed drug dealers.

III

Next, defendant contends the trial court erred in instructing the jury with CALJIC No. 2.62 (7th ed. 2003) which permitted the jury to consider defendant's failure to explain the evidence against him.[1] The record does not show who

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[1] The trial court instructed the jury:

"In this case defendant has testified to certain matters.

"If you find that defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable.

requested the instruction, and defendant acknowledges acquiescence in the instruction.

Even if we were to assume the instructional issue is properly before us, defendant's argument fails on its merits. CALJIC No. 2.62 is appropriate where "a defendant testifies but fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible' explanation . . . ." (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029; see also *People v. Mask* (1986) 188 Cal.App.3d 450, 455.)

Here, defendant offered a bizarre and implausible defense. He failed to provide an adequate explanation of how he switched places with Lucas inside the 4Runner while it was moving, how he supported a $350-a-week drug habit with no steady job, and how Edna Cabrera identified him in the face of claims he was at Marjorie Michael's at the time of the carjacking. Defendant provided no explanation whatsoever for the statement to police that he "lost the tranny."

Contrary to defendant's argument, "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny

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"The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt)." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756.)

IV

Finally, defendant argues the trial court violated his rights to due process and fair trial by instructing the jury with CALJIC No. 17.41.1.[2] He acknowledges that the California Supreme Court ruled in *People v. Engelman* (2002) 28 Cal.4th 436 at pages 439 through 440, that the instruction "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." Defendant also understands that we are bound by that decision under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 at page 455, but seeks to preserve the issue for federal review. We conclude, as we must, that the

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[2] The court instructed the jury with the 2002 version of CALJIC No. 17.41.1 as follows: "The integrity of the trial requires that jurors at all times during the deliberations conduct themselves as required by these instructions. [¶] Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

trial court did not violate defendant's constitutional rights by instructing the jury with CALJIC No. 17.41.1.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

HULL, J.

BUTZ, J.